TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
General	3
Issue of the prosecutor's comment in summation	3
Issue of search and seizure	6
REASONS FOR DENYING THE WRIT	7
I—The prosecutor, by way of summation, did not comment upon the defendant's right to remain silent, therefore, *certiorari* should be denied	7
II—The warrant in question was issued upon probable cause and *certiorari* should be denied	10
CONCLUSION	13

Cases Cited

Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L.Ed. 2d 723 (1964)	11
Harris v. New York, 401 U.S. 222, 91 S. Ct. 643 (1971)	9

PAGE

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) 3, 8, 10

Raffel v. United States, 271 U.S. 494, 46 S. Ct. 566, 7 L. Ed. 1154 (1925) 8

Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584 (1969) 11

State v. Burt, 107 N. J. Super. 390, 258 A. 2d 711 (App. Div. 1969), aff'd. o.b., 59 N. J. 156, 279 A. 2d 850 (1971), cert. den. —— U.S. —— (1972), (No. 71-5509) 8

State v. Macri, 39 N. J. 250, 188 A. 2d 389 (1963) 11

United States v. Harris, —— U.S. ——, 29 L. Ed. 2d 723 (1971) 11

United States v. Ventresca, 380 U.S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965) 11

United States Constitution Cited

Fourth Amendment 3

Fifth Amendment 3, 9

Sixth Amendment 3

Fourteenth Amendment 3

Statutes Cited

N.J.S. 2A:139-1 3

28 U.S.C. Sec. 1257 (3) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-970

ATTILIO AGNELLINO,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

STATE'S BRIEF IN OPPOSITION

Petitioner seeks a Writ of Certiorari to review the order of the Supreme Court of New Jersey entered on November 16, 1971, which denied a petition of Certification to the Appellate Division, Superior Court of New Jersey.

Opinion Below

The order of the Supreme Court of New Jersey was entered on November 16, 1971 and is reported in 59 N. J. 434, 283 A. 2d 533 (1971). The opinion appears in petitioner's appendix at page 1a.

The opinion and order of the Appellate Division, Superior Court of New Jersey was entered on September 29, 1971 and appears in petitioner's appendix at pages 2a through 11a.

The opinion of the Honorable Clarkson S. Fisher, U.S. D.J. (then J.S.C.), rendered in connection with the pretrial motion to suppress appears in petitioner's appendix at pages 12a through 22a.

Jurisdiction

Jurisdiction is invoked under 28 U.S.C., Section 1257 (3).

Questions Presented

1. Whether a prosecutor, in summation, may comment upon failure of a defendant to provide certain information to police officials at the time of his arrest, where the defendant gave certain information to the police at that time, and at trial, testified concerning additional information?

2. Whether a search warrant may issue based upon hearsay information supplied by a person arrested for the same crime?

3. Whether the business establishments of a person may be reasonably included in a search warrant where the suspected criminal activity is possession of stolen property?

Constitutional Provisions Involved

1. Fourth Amendment—search and seizure.
2. Fifth Amendment—right to remain silent.
3. Sixth Amendment—right to counsel.
4. Fourteenth Amendment—due process of law.

Statement of the Case

General:

Petitioner seeks a certiorari in a criminal case whereby he was convicted on two counts of receiving stolen property in violation of N.J.S. 2A:139-1 (T258-10 to 15).

On November 30, 1967, two search warrants were issued authorizing the New Jersey State Police to search two business establishments of defendant, to wit, the Paddock Lounge and Jazz City. As a result of the search of the Paddock Lounge, two rolls of stolen carpeting and three stolen Frigidaire air conditioners, among other things, were recovered (T34-17 to T35-5). The Paddock Lounge is a restaurant and bar with a rooming house and bar above, and exterior shed to the rear of the building (T32-21 to T33-8). The stolen articles were found in the shed (T34-17 to T35-5).

At the time of these events, the defendant was President of the corporation which operated the restaurant (T178-21 to 25).

Issue of the Prosecutor's Comment in Summation:

During the course of the search of the Paddock Lounge, Detective King of the New Jersey State Police advised the defendant of his *Miranda* rights (T39-9 to 19). When

the stolen articles were discovered, defendant was questioned concerning the same and he replied that he had purchased the air conditioners for $150.00 each (T40-24 to T41-2). Defendant was asked if the air conditioners were "hot" and defendant replied "for that price I wouldn't be surprised." (T41-2 to 5; T88-21 to 23; T98-18 to T99-25; T88-24 to T89-1). Concerning the carpeting, defendant stated that he had gotten a good buy on the rugs (T88-16 to 21).

At trial, defendant testified that he bought the air conditioners from one Bill Gordon, who was in the air conditioning business and operated a store called Metropolitan Air Conditioning (T184-11 to 21; T185-21 to T186-13). He paid $175.00 apiece for them (T186-15 to 20). Gordon did not testify at the trial.

During summation, the prosecutor concentrated on the issue of credibility. In connection with that, he stated the following:

> "Now, you take Mr. Agnellino's story. And you consider the logic of the story. Start right off the bat the night of the raid, the police come, Lieutenant King and I forget the number, you may recall it, a number of police officers are on the scene. They go into this shed.
>
> Now, I think you have a right to say to yourselves why are the windows boarded up on this shed? Secondly, say this stuff was coming into your shed and you had three air conditioners and six rolls of rugs. And there's an indication they are looking for stolen property. Logically, what would a normal human being do in that situation? I know what you would do and you know what I would do. I'd say wait a minute, let's find Bill Gordon, that's

where I got those air conditioners from, let's find the interior decorator in Camden.

We have none of that in this case. Here it is 1970—

Mr. Ansell: I hate to interrupt. I'd like to approach side bar.

The Court: All right, you may approach side bar.

(The following conversation was recorded at side bar out of the hearing of the jury.)

Mr. Ansell: The State has taken the position Lieutenant King walked up to Artie Agnellino and said "You don't have to say anything, anything you say can be used against you, you have a right to keep silent."

Now, the State wants to penalize Mr. Agnellino for staying silent. I suggest to the Court that is absolutely improper and unfair and absolutely no basis in the law for the Prosecutor making that kind of comment.

Mr. Smith: I disagree. Constantly Mr. Ansell told this jury this is the defendant's first opportunity.

The Court: I think it's fair comment.

(End of side bar conversation. The following was recorded in open court.)

Mr. Smith: So I was saying in assessing Mr. Agnellino, I think you have a right to say that to yourself. Well, what would a normal human being do when the police are there? There's a raid going on and the property apparently has been stolen and it just doesn't ring true, this man if he didn't have

some guilty knowledge wouldn't have done that. And that's what you're looking for in this case.

You can get over that hurdle of whether or not they are stolen pretty easily. The thing you're looking for is what was in his mind, what did he do, what was he aware of and we can't come in and open his head and say there it is, I can point to it. It's something you have to infer from the whole picture, the whole story here. You put those pieces in the puzzle." (T212-20 to T214-24)

The prosecutor then went on to discuss the concept of guilty knowledge and inferences which may be drawn from the facts.

On appeal, the issue concerning whether or not these comments were unfair was raised in both the Appellate Division, Superior Court of New Jersey, and the New Jersey Supreme Court.

Issue of Search and Seizure:

Detective Walter King of the New Jersey State Police made application for a search warrant to the Honorable Stanley Cohen, Magistrate of the City of Long Branch, for the issuance of a search warrant to search the Paddock Lounge for stolen television sets, on November 30, 1967 (Pa24-26). The affidavit set forth Detective King's belief that stolen Silvertone color television sets were located on the premises. The basis for this belief was stated as

1) that the Paddock Lounge was owned by defendant, 2) that information was received by a person arrested for possession of a Silvertone television set, that he had received the set from defendant and one "Nunzio" at a

gas station in Long Branch, and 3) that the sets were stolen from a railroad car in Newark, New Jersey sometime between 9:00 P.M. November 18, 1967 and 10:00 A. M. November 20, 1967 (Pa25 and 26). The warrant was issued by Judge Cohen at 8:02 P.M. on November 30, 1967 (Pa27 and 28). A warrant was also issued at this time to search the premises leased by defendant known as Jazz City (Pa32 and 33). The two premises were located a short distance from the gas station where the felon stated that he received the television, as noted by Judge Fisher in his opinion on the motion to suppress (Pa16).

The warrant for the Paddock Lounge was executed at approximately 8:50 P.M. on November 30, 1967 (T32-11). Search of the premises concluded shortly after midnight after the stolen items were discovered (T90-8 to 9). The premises was secured and the police subsequently returned and confiscated the stolen property (T90-7 to 20).

Motion to suppress the evidence as a result of an illegal search and seizure was held prior to trial, which motion was denied (Pa23). This issue was raised on appeal and presented to both the Appellate Division, Superior Court of New Jersey and the New Jersey Supreme Court.

Reasons for Denying the Writ

I.

The Prosecutor by way of summation, did not comment upon the defendant's right to remain silent, therefore, *certiorari* should be denied.

The State does not dispute the legal right of petitioner while he was in police custody to refrain from making any statements to the authorities, and if petitioner had

not taken the witness stand, nothing of his silence during custody could be brought out at trial. However, petitioner did make certain statements to the police after being advised of his rights under *Miranda* v. *Arizona*, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and did take the witness stand at trial. Under these circumstances, must the State resignedly accept the account as testified at trial and must the State be denied the right to penerate and inquire into the plausibility and believability of the testimony simply because it comes from the defendant himself and not from a witness? The answer must be grounded in obvious common sense as well as law.

In *Raffel* v. *United States*, 271 U. S. 494, 46 S. Ct. 566, 70 L. Ed. 1154 (1925), the Court stated:

> "The immunity from giving testimony is one which the defendant may waive by offering himself as a witness . . . When he takes the stand in his own behalf, he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined as to the facts in issue . . . He may be examined for the purpose of impeaching his credibility . . . His failure to deny or explain evidence of incriminating circumstances of which he may have knowledge, may be the basis of adverse inference, and the jury may be so instructed . . . His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examinations may be inconvenient or embarrassing." (citations omitted.) 271 U. S. at p. 494.

Recently in *State* v. *Burt*, 107 N. J. Super. 390, 258 A. 2d 711 (App. Div. 1969), aff'd. o.b., 59 N. J. 156, 279 A. 2d 850 (1971), *certiorari* denied —— U. S. —— (1972),

(No. 71-5509), the New Jersey Appellate Division was concerned with comment upon a defendant's failure to tell the police the exculpatory version of the incident to which he testified at trial. Therein the Court held:

> "We conclude that no violation of defendant's Constitutional rights were involved. The thrust of the prosecutor's remarks were not that the defendant had remained silent after he had been arrested but rather that if the shooting had been accidental, as defendant claimed, the normal reaction would have been to so indicate to the police at the earliest opportunity. This was legitimate argument for the State to make.
>
> ". . . Defendant's failure to tell anybody at the time that the shooting of Owens was accidental was relevant to the issue of the credibility of his courtroom testimony and was permissible." (citations omitted). 107 N. J. Super. at p. 393.

The relevant portion of the Fifth Amendment consists of the following words: "No person . . . shall be compelled in any criminal case to be a witness against himself." No one compelled petitioner to speak to police upon his arrest. He took the witness stand voluntarily. The summation of the prosecutor was clearly intended to test the credibility of petitioner's testimony and no more. The rule of law that an accused in a criminal case shall not be compelled to be a witness against himself, should not be extended to produce the result that comment may not be made to test whether the story told on the witness stand was not given to the police earlier.

In *Harris* v. *New York*, 401 U. S. 222, 91 S. Ct. 643, 28 L. Ed. 2d (1971), the Court dealt with the admissibility of a statement by a defendant which had been obtained

by the police without first giving the requisite *Miranda* warnings. Therein, the Court ruled that the statement was admissible to impeach the credibility of the defendant who had given a different version of the crime at trial than he had given previously to the police.

Wherein lies the distinction between that which was said by the defendant at a prior occasion and that which was not said by a defendant when he chose to speak after advice of his rights? The privilege embodied in the Fifth Amendment should not be used as a shield to prevent comment upon conflicting or natural responses, when, in essence, a trial is truly a quest for the truth. Should a witness be shielded from obvious comments upon that which accords with human affairs because he is a defendant in a criminal action? The comments by the prosecutor were made within the scope of credibility of the testimony presented and were manifestly correct based upon the proofs adduced.

II.

The warrant in question was issued upon probable cause and *certiorari* should be denied.

Petitioner alleges that the warrant in question was not issued upon probable cause. The affidavit reflects that an individual was arrested for possession of a stolen Silvertone television set. This and other sets were stolen from the Newark railroad yard sometime between 9:00 P.M. on November 18, 1967 and 10:00 A.M. on November 20, 1967. The arrested felon stated that he received the set from petitioner at a gas station located on the corner of Morris and Chelsea Avenue, Long Branch, New Jersey (Pa25 and 26). As indicated by Judge Fisher, the prem-

ises of petitioner sought to be searched were only a short distance from this gas station (Pa16). The affidavit was made on November 30, 1967 and the warrant was issued on the same day. Therefore, the longest lapse of time between the receipt of the information and the application for the warrant would have been ten days.

When dealing with information received from a third person, the issuing magistrate must be presented with sufficient facts and surrounding circumstances which would indicate the reliability of the information received. *Aguilar* v. *Texas*, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *State* v. *Macri*, 39 N. J. 250, 188 —— A. 2d 389 —— (1963). Hearsay information must be coupled with circumstances which add an atmosphere of trustworthiness. *Spinelli* v. *United States*, 393 U. S. 410 (1969). However, when the information is received from an arrested felon, it constitutes an admission against penal interest and must be given substantial probative weight. *United States* v. *Harris*, —— U. S. —— 29 L. Ed. 2d 723 (1971).

In the case at bar, a person had been arrested for receiving a stolen television. He stated that he had received the set from petitioner. Petitioner's business premises were a short distance from the location of the transaction. Finally, a check revealed more than one set had been stolen from the Newark yard.

The State respectfully directs the Court's attention to *United States* v. *Ventresca*, 380 U. S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965), wherein Mr. Justice Goldberg stated:

> "These decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract.

> If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts towards warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." 380 U.S. at p. 102.

To what lengths are police officers, acting in the legitimate pursuit of their duties, expected to go? To what absurdities need the underlying facts and circumstances be carried? All searches and seizures must be viewed in the light of reasonableness under the facts and circumstances presented. What may be reasonable in one situation may be unreasonable in another. Here, the police officers acted reasonably based upon reliable information.

Concerning the issue of alleged failure to establish ownership of the premises, this point was not raised below and should not be included in the consideration of the issuance of the writ.

CONCLUSION

For the foregoing reasons and authorities cited in support thereof, the State respectfully submits that the Petition for Writ of *Certiorari* to the Appellate Division, Superior Court of New Jersey, be denied.

Respectfully submitted,

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